No. 3974

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

A. EIKLAND AND O. EIKLAND,

Plaintiffs in Error,

vs.

W. W. CASEY, HENRY SHATTUCK and ALLEN SHATTUCK,

Defendants in Error.

Petition for Rehearing

J. H. COBB,
Attorney for the Plaintiffs in Error,
and Petitioners.

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To the Honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Plaintiffs in Error, believing that under well established precedents, they are entitled to a reversal of the judgment against them upon the errors of the trial court, found and pointed out in the opinion of this Court, and that such errors were not harmless, most respectfully, but most earnestly petition your Honors for a rehearing.

Your Honors held and decided that the evidence "fell far short of proving that the flooding was so far due to natural causes, directly and exclusively with-

out human intervention, that it could not have been prevented by any amount of foresight and care reasonably to have been expected of defendants.

"The court therefore, should have decided as matter of law that the flooding was not due to an Act of God," etc. But the Court, further along in the opinion says: "but in no way could such error have prejudiced the plaintiffs. Surely plaintiffs cannot complain if the verdict was rendered upon the ground that the damages were caused by inevitable accident or the result of vis major, or the Act of God, against which one cannot reasonably be expected to guard, provided the correct rule applicable was stated, as it was in substance; that if it was found that the construction of the bulkhead or flume contributed to or caused the damage complained of, and such result could not have been reasonably anticipated or foreseen, verdict should be for defendents; but that if the damage could have been reasonably anticipated as resulting from the construction of the bulkhead or flume, defendants would be liable."

But the trial court also charged the jury, and this appears to have been overlooked by your Honors, that, "Naturally two questions arise under the issues and admitted facts" etc. (first the question of defendants negligence, and then) "The second question is: *whether the damage complained of was caused solely by an Act of God, and in no way contributed to by the act of the defendants in the construction of the flume.*" (Rec. pp. 381-2 Italics ours).

And again the trial court told the jury: "An extra-

ordinary flood, to constitute which would be an act of God, *relieving a person from all liability,* is one of those unexplained visitations," etc. (Rec. 388, Italics ours).

And again, after instructing the jury, in substance, that if the damage was the combined result of an act of God and negligence of defendants, the defendants were liable, the court modified the rule given by this qualification, *"unless the damage would have happened if he had not been negligent."* (Rec. 390. Italics ours).

Now there was no evidence that this flood, which raised the water only 6.81 feet was the Act of God; there was no evidence that the flood would have done any damage to plaintiffs' property alone and of itself, that is, that it was an Act of God *"relieving a person from all liability."* Yet the jury *may have decided,* indeed most probably did decide, that the flood was an Act of God, and therefore defendants were relieved of all liability in any event, or, that being an Act of God, the destruction of plaintiffs' property "would have happened if he (defendants) had not been negligent." Certainly this Court cannot say from the record that such consideration did not influence and control the jury in arriving at the verdict. When that is the case, the law is that the unsuccessful party is entitled to a new trial.

"Where erroneous instructions are given the verdict of the jury should not be permitted to stand, unless it is plain from the record that it must have been what it was in spite of the instructions."

Wiersbick v. Illinois Steel Co. 94 Ill. Ap. 400.
McVey v. St. Clair Co. (W. Va.) 38 S. E. 648.

Can this Court say with any certainty that if the trial court had not erroneously injected the question of the Act of God into the instructions; if the jury had not been told that an Act of God relieved from all liability; if they had not been told in effect, and without evidence to support the instruction, that even though defendants were negligent yet if the flood was the Act of God, and the damage would have happened anyway, they were not liable, the verdict would not have been for the plaintiffs?

"If it be possible that the unsuccessful party was prejudiced by an erroneous instruction, the verdict must be set aside."

Davenport vs. Prentice. 110 N. Y. S. 1056, 126. App. Div. 451. Id. 118 N. Y. S. 933. 134 App. Div. 934.
McBride vs. Huckins 81 A. 528 (N. H.).

Can this Court say that the error of the lower court in assuming that there was evidence that the damage was done solely by and Act of God, did not prejudice the plaintiff? May not the jury have been influenced thereby to minimize the evidence of plaintiffs tending to show negligence and referred to and decided the whole case on the theory of the Act of God?

May it not be that this erroneous instruction, given in disregard of the former decision of this court, led the jury to base the verdict upon the theory that although there was negligence in the construction of the flume, such as would have rendered the defendants lia-

ble had the damage resulted from an ordinary flood, yet they were not bound to foresee and provide against an Act of God, and so were not liable? Can this Court say that the verdict was not influenced by some such theory based upon the erroneous instruction complained of?

"Where it is impossible to say upon what theory or upon what part of the Court's charge a verdict was based, error in any one of the instructions which may influence the jury entitled the unsuccessful party to a new trial."

Ayer vs. Lord Tie Co. 117 S. W. 1080.

Western Union Tel. Co. vs. McMullin 135 S. W. 909.

Bruce vs. Horn 52 Pac. 1036.

Balderston vs. Cudahy Packing Co. 117 N. W. 986.

Kirk vs. Smith 138 Pac. 1088.

Morrow vs. Southern Ry. Co. 61 S. E. 622, 16 L. R. A. (N. S.) 642.

Auto Gas Engine Works vs. Pepper, 77 A. 443.

"Where it cannot be determined whether the jury followed correct instructions given or conflicting erroneous instructions also given, the verdict must be set aside."

Heder vs. California Hospital Co. 174 Pac 654.

Now it is impossible to say whether the jury in this case did not reach their verdict upon the theory that the damage was an inevitable accident due to an Act of God, "against which one cannot reasonably be expected to guard," and disregarded entirely the question of the

negligence of the defendants as being wholly immaterial. The correct rule given by the trial court may not have been followed by the jury at all, because they may have thought that the issue of the Act of God, twice decided by this court to be wholly erroneous, controlled the case. Surely then the plaintiffs can justly, and should successfully, "complain if the verdict was reached upon the ground that the damages were caused by inevitable accident of vis major or Act of God, against which one cannot reasonably be expected to guard," when this court has twice decided there was no evidence tending to sustain any such ground; and this nothwithstanding the jury were also told "that if it were found that the construction of the bulkhead or flume contributed to or caused the damage complained of, and such result could not have been reasonably anticipated or forseen, verdict should be for defendants; but that if the damage could have been reasonably anticipated as resulting from the construction of the bulkhead or flume, defendants would be liable." For the jury were also told that an "Act of God, *relieving from all liability* (Italics ours) is one of those unexplained visitations" etc., and that if the flood was an Act of God, and defendants were negligent, yet they were not liable if this assumed Act of God would have caused the damage in any event. Suppose the jury, when they retired to consider of the verdict, read the charge of the Court, and when they came to the definition of the Court of an Act of God, "relieving from all liability," simply stopped, and said, "That settles the case. The flood was of course the Act

of God, and as such relieves from all liability. We will find for defendants." Would not the plaintiffs have a just cause of complaint? Ought not the verdict to be set aside? Can this Court say that the verdict was not reached in some such way? Or suppose the jury found the defendants negligent in every respect charged, but further found that the flood was an Act of God, and being an Act of God, and because it was an Act of God would have destroyed plaintiffs' property any way, and based their verdict thereon; but would have found otherwise if they had not been permitted to lay the blame on the Almighty, would not the plaintiffs have just cause of complaint? In other words, can this Court say that the erroneous instructtions given did not influence the jury in arriving at their verdict, either by deciding upon an issue not raised by the evidence or by giving that issue weight and value in determining the question of defendants negligence? It may well be, that the jury found the defendants negligent in not anticipating and sufficiently providing against the danger from an ordinary flood, such as was to be expected, and not negligent in failing to provide against an Act of God.

The principles above enunciated have been applied by this Court in a recent case.

Richards vs. American Bank of Alaska, 234 Fed. 300.

The action was upon a promissory note against Richards, the plaintiff in Error, and one Williams. Richards gave Williams a sum of money to buy a one-fourth interest in a mine; there was no evidence of a general

partnership between Richards and Williams, to purchase the whole mine, though they were to be jointly interested in the share to be purchased. Williams borrowed money to buy the whole mine, and executed the note sued on, purporting to be the obligation of himself and Richards, and as a partner signed Richard's name. There was some evidence tending to show a ratification by Richards of Williams acts. The lower court submitted two issues to the jury, a finding of either one of which in plaintiff's favor entitled it to a verdict, 1st, whether there was a partnership agreement between Richards and Williams, and the latter authorized to borrow money and bind the firm, and 2nd. whether Richards had ratified the transaction. There was a general verdict for the plaintiff.

This Court on Writ of Error *held*:

That the submission of the first issue to the jury was improper not being authorized by the evidence, and that as it did not appear from any special finding or otherwise, that the verdict was based upon any ratification by Richards, it was reversible error. It would seem from the report of the case, that counsel contended that the error was harmless, and did not vitiate the verdict; at any rate the court decided the point, and in disposing of it Judge Gilbert said: "If it appeared from a special finding or otherwise, that the jury's verdict was based on the ground that Richards subsequently ratified the act of Williams, we might pass over this assignment of error as harmless; but the verdict being general we cannot say that the erroneous instruction so given did not affect the result."

So in this case at bar. The verdict is general. It does not appear from a special finding or otherwise, whether the verdict was based upon a finding that the damage resulted from an Act of God "relieving from all liability." (Rec. 388). or upon a finding that the damage was caused by an Act of God contributed to by the negligence of the defendants, but which would have happened if defendants had not been negligent. (Rec. 390) ; or upon a finding that the flood was an ordinary one, and defendants were free from negligence. If the verdict was based upon either of the first two it was based upon instructions twice decided by this Court to be erroneous. Yet how can the Court say it was not? What is there in the record to even indicate that it was not? Absolutely nothing. Yet your Honors say in your opinion that we "cannot complain if the verdict was reached upon the ground that the damages were caused by inevitable accident as the result of vis major or Act of God, against which one cannot reasonably be expected to guard, provided the correct rule was stated as it was in substance; that if it were found that the construction of the bulkhead or flume contributed to or caused the damage complained of, and such result could not have been anticipated or foreseen, verdict should be for the defendants; but that if the damage could have been reasonably anticipated as resulting from the construction of the bulkhead or flume defendants would be liable." This deduction we think untenable even as stated by yours Honors, but it is assuredly untenable when it is found that in one of the instructions complained of an Act of God is

defined as one "relieving from all liability," and in another the jury are permitted to find for defendants if they find that the damage was caused by an Act of God contributed to by the negligence of the defendants and for which they would be liable "unless the damage would have happened if the (defendants) had not been negligent." (Rec. 390). That is, that the damages being caused by an Act of God, would have occured in any event, and defendants were therefore not liable for contributing thereto.

Our position on this question is, we think, strengthened, if it needs strengthening by consideration of another element that entered largely into the case. The record shows that during the existance of the town of Juneau, until about 1913 or 14 the flats composing the delta at the mouth of Gold Creek had not been settled or built upon. There was nothing there to be damaged by floods and nothing to attract attention to flood waters. Beginning in 1913, and during 1914, and '15, defendants attempted to reclaim this low ground lying to the southwest of plaintiff's lot, and between the bulkheaded channel and the channel commonly referred to as the main channel, which was subject to being flooded at every period of high water, by confining the creek to one channel, the one confined by the bulkheads. Between the time of the construction of the bulkhead channel and the date of the flood, Sept. 26th, 1918, defendants sold many lots on the delta, and the area had been covered with many dwellings. The flood of Sept. 26th, 1918 was the first high water after this condition had been brought about, and was the first time

that any persons or property had ever been exposed to danger from flood waters in that creek. As a consequence, there was great excitement in the little town on that day. Plaintiffs' home, and two or three contigious houses, all situated on the highest ground in the whole flat, were being undermined and washed away by the strong current diverted against them by the broken and choked flume. The fire department was called out, and many volunteers who had never before particularly noticed the creek in flood went down to the scene. The sight of persons and property exposed to danger, the crowds, the excitement, all contributed to heighten the sense of a catastrophic phenomenon. Now all this atmosphere, the defendants injected into the trial by calling a cloud of witnesses whose testimony this Court holds did not even lend to establish the point upon which they were called. Under such circumstances the trial court should, in simple justice to plaintiffs, not only have been strictly accurate in the instructions given, but so guarded them as to remove this extraneous matter so favorable to the defendants claim of the defense of Act of God. This was not done. On the contrary the issue of an Act of God, was, without evidence to sustain it, given to the jury. An Act of God was defined in one place in the instructions as something "relieving from all liability." It is true that at another place, the correct rule, based however upon the erroneous assumption of an Act of God, was given, to the effect that if the negligence of defendants contributed to the damage they were liable, yet this was again modified by an instruction that

authorized a finding for defendants on the theory that the flood was an Act of God so catastrophic that the damage would have occured regardless of plaintiffs negligence. And all this in the face of the decision of this Court that there was no evidence tending to show any such state of fact.

We believe that a perusal of the record will convince every fair-minded person that the trial below resulted in a miscarriage of justice. That miscarriage, we think, was caused by errors of the lower court, assignment of which this court in its opinion sustains. But surely it cannot justly be said that it appears from the record that those errors did not affect the result.

Your Honors, say in closing the opinion: "The facts having been found against the plaintiffs, and there being no prejudicial error of law, the judgment will be sustained."

What facts were found against plaintiffs? Did the jury find that the flooding "was due to natural causes, directly and exclusively without human introvention, that it could not have been prevented by any amount of foresight and care reasonably to have been expected of defendants?" The instructions of the lower court authorized such a finding, yet this court has twice held that the testimony "fell far short of proving" that. Were the facts found against plaintiffs these: that the damage was due to an Act of God relieving against all liability? or that the flooding was due to Act of God, contributed to by the negligence of defendants, and for which they would have been liable, but the jury further found that the damage would have occured even if de-

fendants had not contributed thereto because it was an Act of God? For the court instructed the jury that "where an injury is the combined result of the negligence of the defendant and of an accident for which he is not responsible, he must pay damages, unless the damage would have happened if he had not been negligent." Rec. 390. This is not the law, but was given as a modification, or limitation, of instructions which your Honors held cured the errors pointed out in the assignment, twice sustained by this court.

These considerations, we think, lead inevitably to the conclusion that it cannot be said that the facts which should legally and properly have been submitted to the jury were decided against plaintiffs. The verdict may have been based solely upon findings wholly without support in the evidence, in which case the errors of the lower court were indeed prejudicial, and deprived plaintiffs of a fair or legal trial.

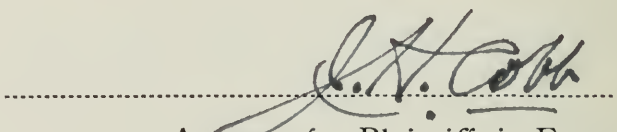
Your Honors, in your opinion, after holding that the issue of the Act of God should not have been submitted to the jury, also say: "But the elimination of that question does not compel the conclusion contended for by plaintiffs that defendants were liable for the damages caused by the flooding, for there still remained the question whether the flooding which caused the damage was attributed to the negligence of the defendants." Very true; but as already pointed out, it may well be, and most probably was, that the jury never considered or decided that question at all, erroneously finding that the damage was due solely to an Act of God, and con-

ceiving in the light of the courts instructions that that settled the case against plaintiffs.

In conclusion we most earnestly pray that the court will be pleased to grant a rehearing, and upon such rehearing to reverse the judgment below, and grant a new trial.

Respectfully submitted,
J. H. COBB,
Attorney for the Plaintiffs in Error,
and Petitioners.

I HEREBY CERTIFY that in my opinion the above and foregoing petition is well founded, and is not interposed for delay.



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